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IN THE

Supreme Court of the United States

October term, 1965

No. 169

SUN RAY DRUG COMPANY, *Petitioner*

v.

IDA LIEBERMAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on November 12, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is reported in 204 Pa. Superior Court 348 and appears as an appendix to this petition at page 11, infra. The opinion of Court of Common Pleas (R. 173a-177a; 186a) and the decisions of the Workmen's Compensation Board of Pennsylvania (R. 147a-149a; 162a-163a) are unreported, and are set forth in the Record.[1]

[1] "R." references are to the Record printed for the Superior Court of Pennsylvania, nine copies of which have been filed with this Petition.

JURISDICTION

The opinion of the Superior Court of Pennsylvania was rendered on November 12, 1964. A timely petition for reconsideration and reargument was refused on December 4, 1964. A petition for allowance of appeal to the Supreme Court of Pennsylvania, filed on December 28, 1964, was denied on March 1, 1965. ~~On March 25, 1965, notice of appeal to this Court was filed with the Prothonotary of the Supreme Court of Pennsylvania.~~

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3), since rights and privileges under the due process clause of the Fourteenth Amendment were set up and claimed in the Courts below. The Fourteenth Amendment affords redress against arbitrary action by State Courts.

The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673; *Copperweld v. Industrial Commission*, 324 U.S. 780; *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, 363 U.S. 1037.

QUESTIONS PRESENTED

1. Is a litigant denied due process of law under the Fourteenth Amendment where the state Courts refused to pass upon or decide substantive defenses properly presented, which, if sustained would bar recovery?

2. Do state Courts, within federal guaranty of due process of the law, have the discretion or power to refuse, without reason or explanation, to decide material issues which are properly presented?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On April 5, 1956, Louis Lieberman, age sixty, while inspecting a ceiling, fell from a scaffold and sustained injuries which were diagnosed as a fracture of the left acetabulum, dislocation of the hip and lacerations of the chin. He was hospitalized until June 5, 1956. On November 1, 1956, he was certified by Dr. Friedenberg, an orthopedic specialist, to have recovered sufficiently to return to work on a limited basis. He worked from February 1, 1957, regularly with the aid of crutches or cane without mishap until February 22, 1957. On February 24, 1957, he collapsed at his home and he was taken to the Presbyterian Hospital, where his condition was diagnosed as small cerebral vascular accidents. Dr. Laskin, the family physician, treated him for the cerebral condition and he certified that the cause of death was a small cerebral accident.

Decedent's widow, alleging that the death was causally connected with the accidental injuries, filed a claim under the Pennsylvania Workmen's Compensation statute. Petitioner contended that death was due to natural causes and not to the accident, which, occurred fourteen months before. Claimant, to sustain her burden of proof as to causal relationship, relied upon the testimony of Dr. Victor Digilio, a specialist in cardio-vascular diseases, who never saw or

treated the employee during his lifetime. Dr. Digilio testified, in answer to a hypothetical question, that decedent by reason of the accident of April, 1956 with the necessary confinement and the later use of crutches was pre-disposed to the involvement of the cerebral vascular disturbances which caused his death. Dr. Digilio based his opinion on specific factors which the employer contended were unsupported by evidence or were contradicted by the competent evidence in the case. Dr. Friedenberg, who treated the decedent for the accidental injuries, and Dr. Laskin, who treated the decedent for the cerebral disease, both unequivocally testified that there was no direct relationship between the accidental injuries and death. At the hearings before the Workmen's Compensation tribunals, objections were timely made to the legal sufficiency of the opinion evidence of Dr. Digilio. The Referee awarded compensation and an appeal was duly taken whereunder the legal sufficiency of the opinion evidence of claimant's medical expert was challenged on the specific grounds that such evidence has no validity when based upon erroneous or unsupported assumptions.

Petitioner's appeal was sustained and the Workmen's Compensation Board vacated the award and dismissed the claim petition. The Board found, inter alia: "It is highly improbable that the original accident directly contributed to decedent's death. The fact that he had sufficiently improved in the opinion of his attending physician to return to work indicates decedent's death to be the result of the natural progress of the coronary condition that he had developed prior to the accident." (R-149a).

Claimant later filed a petition for reconsideration and reargument based upon the ground that her counsel had never filed a written brief in support of oral argument (R-153a). The Board, consisting of new personnel, granted said petition and, without hearing new evidence, rendered a decision whereunder it vacated the prior decision of the Board and reinstated the award on the ground that they

were "persuaded that although the claimant's accident of April 5, 1956, did not directly cause the vascular complications of February 24, 1957, and his death on June 21, 1957, the evidence did substantiate the fact that the original accident of April 5, 1956, did hasten and accelerate the claimant's death." (R-163a). In vacating its prior decision, however, the Board did not pass upon the objections to the legal sufficiency of the opinion evidence of Dr. Digilio which petitioner assigned in the initial appeal from the award of the referee.

Petitioner duly prosecuted its appeal from the decision of the Board to the Court of Common Pleas; exceptions Nos. 3 and 6 squarely point up the legal insufficiency of the opinion evidence of Dr. Digilio because it was based upon hearsay testimony and assumed facts which were not supported by evidence or assumed facts which were contradicted by the evidence in the case (R-164a-166a).

The Court dismissed the appeal upon the finding that testimony of claimant's medical expert, Dr. Digilio, supported the finding as to causal connection, but it failed to consider or decide the contention that said opinion-evidence was legally insufficient because it was based upon unwarranted and improper factual assumptions (R-173a-178a).

A Petition for Reconsideration and Reargument was duly filed calling attention to the failure of the Court to pass upon the contention that opinion evidence which is based upon unsupported or erroneous assumptions has no validity under Pennsylvania law. The Court granted reargument, but it reaffirmed its prior decision *without deciding the issue as to the validity of opinion evidence based upon unsupported and erroneous facts* (R-180a).

An appeal was duly taken to the Superior Court of Pennsylvania, the Court of final resort under the Statute, and petitioner on said appeal squarely raised the issue of the validity of opinion evidence as follows (Appellant's Brief, p. 1, "Statement of Questions Involved"):

"A. Is the opinion of the medical expert, upon which claimant relies to establish causal relationship between accidental injuries involving hip, shoulder, chin and leg and death fourteen months later from cerebral vascular hemmorrhages, legally sufficient where:

"(1) it is based upon assumed facts not supported by evidence;

"(2) it is based upon assumed facts contradicted by the evidence in the case;

"(3) it is based upon hearsay testimony to which objection was duly taken?

(Raised but not decided by the Court below.)"

On November 12, 1964, the Superior Court of Pennsylvania, in an opinion by Watkins, J., affirmed the judgment entered in the Court below and dismissed the appeal without deciding said questions raised in "Statement of Questions A" (Appendix).

A petition for Reconsideration and Reargument was duly filed calling attention to the failure of the Court to pass upon and decide these substantive issues.

Petitioner in said Petition for Reconsideration called attention to the fact that the failure of the Court to decide said legal issues constituted a violation of rights as to due process under the Fourteenth Amendment as follows:

"In these circumstances, it is respectfully submitted that the failure or refusal of appellate courts to decide substantive legal issues, bearing upon the rights and liabilities of an employer, constitutes, in effect, denial of due process guaranteed to all litigants under the Fourteenth Amendment of the Federal Constitution and under the Constitution of Pennsylvania." (Petition for Reconsideration, pp. 5 and 6 of Certified Record.)

The Superior Court refused to grant reargument and reconsideration.

A petition for allowance of appeal to the Supreme Court of Pennsylvania was duly filed and the claim of violation of petitioner's rights under the due process clause of the Fourteenth Amendment was squarely set-up and claimed, under heading "Statement of Questions Involved" as follows:

> "(1) Is an employer in Workmen's Compensation cases denied due process of law guaranteed under the Fourteenth Amendment of the Federal Constitution where:
>
> "(a) The appellate tribunals, including the Superior Court, arbitrarily refuse to discuss or decide substantitive and decisive legal questions which were specifically raised and argued." (Certified copy of Record p. 279).

The Supreme Court of Pennsylvania denied allocatur. The contention that a compensation award cannot be sustained where the expert medical opinion relied upon to establish causal connection between the injury and death is based upon assumed facts not established by competent evidence is an entrenched and established legal principle which has been steadfastly applied by the appellate courts of Pennsylvania in a long line of cases. A few of the many cases applying this principle are: *Hecker v. Shannopin Coal Co.*, 137 Pa. Superior Ct. 581; *Rich v. Philadelphia Abbatora Co.*, 160 Pa. Superior Ct. 200; *Dennis v. Jarka Corp.*, 182 Pa. Superior Ct. 498; *Monohan v. Seeds Durham*, 336 Pa. 67, 73; *Kenny v. Thornton-Fuller*, 190 Pa. Superior Ct. 552, 557; *Cope v. Philadelphia T & S Co.*, 167 Pa. Superior Ct. 205. Said principle was reiterated in the recent decision of the Supreme Court of Pennsylvania in *Murray v. Siegal*, 413 Pa. 23, 29, 30 (1963), as follows: "An expert cannot express a conclusion which is based on facts not in evidence."

These decisions and others were cited to the Court in the proceedings below, but said Courts obdurately and unreasonably refused to adjudicate the cause on the merits in the light thereof.

In the circumstances of this case, petitioner could not have anticipated that the Superior Court of Pennsylvania would deviate from normal appellate practice so as to refuse to pass upon or decide a paramount question which was properly raised and submitted. The right to due process under the Fourteenth Amendment was promptly set up and claimed in the petition to the Superior Court for Reargument and Reconsideration and it was specifically claimed in the petition for allowance of appeal which was filed with the Supreme Court of Pennsylvania as shown above. Accordingly, the federal question was properly raised in the Courts below: *Herndon v. State of Georgia*, 295 U.S. 441; *Saunders v. Shaw*, 244 U.S. 317.

REASONS FOR GRANTING THE WRIT

The issues presented by this petition are of extreme importance in the administration of justice.

If the conduct of the Courts below is countenanced, inviolate rights to due process under the Fourteenth Amendment will be subject to the favor, grace or discretion of said Courts, and federal guaranty of due process will be rendered in effective and impotent.

In *Roller v. Holly*, 176 U.S. 398, 409, this Court declared:

> "The right to due process of law must rest upon a basis more substantial than favor or discretion."

In *Louisville v. N. R. Co. v. Central Stockholders Company*, 212 U.S. 132, 144, it was said:

> "The law itself must save the parties' rights and not leave them to the discretion of the Courts as such."

These precepts have been violated by the unprecedented refusal of the State Courts to adjudicate a substantive legal defense which was properly raised and presented in the proceedings below. A basic requirement of due process under the Fourteenth Amendment is that a litigant be permitted to raise issues and to have a fair and impartial hearing thereon. The defense which the Courts below refused to decide was neither frivolous or irrelevant. To the contrary, it was a crucial issue and, if upheld, would have defeated recovery. This issue was of such importance that the Supreme and Superior Courts of Pennsylvania in at least six cases, beginning with *Hecker v. Shannopin Coal Company* and concluding with *Cope v. Philadelphia T & S Company*, cited in the Statement of the Case, set aside or refused the awards because the opinions of the medical experts to establish causal relationship were based upon erroneous or unsupported assumptions. On at least six occasions, petitioner submitted this legal issue for decision but the Courts below, without explanation or reason, refused to decide the question.

In this circumstance, such action must be deemed arbitrary and unreasonable and in derogation of petitioner's inalienable right under the Fourteenth Amendment to raise defenses and obtain adjudications thereon.

Said Courts are subject to the same restraints under the due process clause of the Fourteenth Amendment as the legislative, executive or administrative branches of the State: *Brinkerhoff-Faris Trust and Savings Co., supra; Copperweld v. Industrial Commission, supra; Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church, supra.*

Literally thousands of civil actions are litigated daily. It is of extreme public importance for this Court to resolve the vital issues presented hereunder. If courts can, in the exercise of discretion, determine what questions they will decide on the merits without regard for substance or importance, the federal guaranty that the State shall not deprive any person of life, liberty or property without due process of

law, as proclaimed in the Fourteenth Amendment, will no longer have force or effect. If, as here, a court can deprive a litigation of an adjudication on a substantive defense which is regularly presented, the constitutional right to a fair and impartial trial will no longer have substance or meaning and the orderly administration of justice will be reduced to confusion and even chaos.

CONCLUSION

For the reasons stated, this Honorable Court should grant a writ of certiorari to settle this important and far reaching issue as to whether a person can be deprived of due process of the law under the Fourteenth Amendment by arbitrary judicial action.

Respectfully submitted.

SAMUEL KAGLE
OSCAR BROWN
Attorneys for Petitioner

APPENDIX

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

October Term 1964

IDA LIEBERMAN

v.

SUN RAY DRUG COMPANY, *Appellant*

Argued September 14, 1964. Before ERVIN, WRIGHT, WOODSIDE, WATKINS, MONTGOMERY, and FLOOD, JJ. (RHODES, P. J., absent).

Appeal, No. 441, Oct. T., 1964, from judgment of Court of Common Pleas No. 7 of Philadelphia County, Dec. T., 1963, No. 3987, in case of Ida Lieberman, widow of Louis Lieberman, v. Sunray Drug Company. Judgment affirmed; reargument refused December 4, 1964.

Appeal by employer from award by Workmen's Compensation Board.

Order entered dismissing appeal and directing judgment for claimant, opinion by GOLD, P. J. Defendant appealed.

Samuel Kagle, with him *Oscar Brown*, for appellant.

John Francis Gough, with him *Sheer, McDevitt & Mazzocone*, for appellee.

OPINION BY WATKINS, J., November 12, 1964:

This is an appeal from the judgment of the Court of Common Pleas No. 7 of Philadelphia County, entered in favor of Ida Lieberman, the widow of the deceased claimant, Louis Lieberman, the appellee, and against Sun Ray Drug Company, the employer appellant, in a workmen's compensation case.

The claimant decedent, aged 61 years, was a carpenter and prior to the accident had never lost a day in twenty-three years. He was severely injured while in the course of his employment on April 5, 1965. His injuries were the result of a fall while inspecting a ceiling and included a fractured disclocation of his left hip and injury to his chin, an injury to his right shoulder and a nerve injury involving his leg. On June 5, 1956 he was taken from the hospital to his home where he was provided with a hospital bed. His major difficulty was a form of paralysis from the nerve injury involving his broken hip on the left side. An agreement was entered into between employer and employee by which the decedent received compensation for total disability until February 4, 1957. For some time, because of confinement, he was becoming acutely depressed and on the advice of his orthopedic surgeon he returned to supervisory work while still on crutches with the hope that such activity might prove a therapeutic benefit. He so worked until February 22, 1957 at which time he suffered a cerebral vascular accident for which he was again hospitalized and died on June 21, 1957.

The widow filed her claim petition and the referee awarded benefits. This award was appealed to the board and was vacated on the ground that the decedent's death was not related to the April 5th accident.

After the claimant had appealed to the court below the board granted a rehearing and the case was remanded for this purpose. The action of the board on a petition for a rehearing, while an appeal is pending, is statutory and within the sound discretion of the board. The board, upon rehear-

ing and without new evidence being presented before it, may change its mind as a result of reargument and come to a different conclusion, provided the order of rehearing is not made more than one year after the decision of the board. We have held many times that the board has broad powers to grant a rehearing when justice requires it. *Greeby v. Phila. Asbestos Co.*, 120 Pa. Superior Ct. 9, 181 A. 452 (1935); *Conti v. Butler Consolidated Coal Co.*, 169 Pa. Superior Ct. 276, 82 A. 2d 528 (1951); *Gonzales v. O'Donnell's Broad Street Bar, Inc.*, 204 Pa. Superior Ct. 170, 203 A. 2d 583 (1964); *Thomas v. James J. Skelly, Inc.*, 204 Pa. Superior Ct. 166, 203 A. 2d 339 (1964). The defendant's contention that the board exceeded its authority in rehearing this matter is without merit.

The board's decision after rehearing was based on the following finding:

"We have carefully reviewed claimant's brief and defendant's reply brief of which we did not have the benefit heretofore.

"We are persuaded that although the claimant's accident of April 5, 1956, did not directly cause the vascular complications on February 24, 1956, and his death on June 21, 1957, yet nevertheless, the evidence does substantiate the fact that the original accident on April 5, 1956, did hasten and accelerate the claimant's death. . . . The testimony of Dr. Digilio, Dr. Laskin and Dr. Friedenberg each supports this view."

This is a finding that the accident of April 5, 1956 contributed to the resulting cerebral vascular accident that caused death on June 21, 1957 or, in other words, that there was a causal relation between the accident and the death. The testimony of Dr. Digilio was unequivocal. He testified as follows:

"Now, in the first place, when you take an individual of sixty, let us say, and he had been accustomed to being around and doing physical work that Mr. Lieberman was doing which after all was that of a carpenter, since he fell

off the scaffold I have a right to assume he climbed ladders and everything else that a carpenter does; so, he was a physically able individual and he did physical work.

"Now, when we take an individual who is accustomed to that type of work at his age and then put him into an enforced rest, several things happen. Namely; One, there is a change in the circulation. Certainly a layman can understand when exerting ourselves at a more rapid rate or the higher velocity is felt and as we rest, the circulation is lower or slower.

"Now, that is an important factor because we know that slowness of circulation is an important factor in the development of thromboses. That is the coagulation of the blood or development of clots within the blood vessels. As a matter of fact, that is exactly what happened in the cerebral vascular accident of the type that Mr. Lieberman had.

"Now, there is another thing which we have to consider: That certainly a man of his age had a certain amount of certain sclerosis and we must consider that his arteriosclerosis he did in fact have was not sufficient to disable him, prior to the accident, from doing and engaging in the activity necessary in his work.

"So that he had, we must assume therefore, a normal amount of the arteriosclerosis but this arteriosclerosis does in fact cause a roughening of the surfaces of the blood vessels over which the blood must traverse, must travel; and when the blood is slow, must go over this uneven surface, there are two factors of involvement of thrombosis or clots within the blood vessels, and in this case, any cerebral vessels.

"Now, there is another factor which we must consider that is important. An individual of any age who is put at rest loses muscle tone. Now, there is an important difference in a man of sixty who loses muscle tone and one of twenty or thirty. The latter will get back his muscle tone much more readily, much more quickly and suffer less consequences. That is not so of an individual of the former

year age or in the sixties. Here a loss of muscle tone is difficult to recapture but there are consequences in the recapturing of this muscle tone as follows: We do know that the athlete, who is well trained, uses his cardiovascular system in his athletics much less than an untrained individual. This means that the muscle tone is important; that the presence of adequate muscle tone is important in the lessening of the work of the cardiovascular even in normal activities.

"Now, with a man of sixty with loss of that muscle tone due to enforced rest, the layman or anyone can easily understand how important that cardiovascular system is in having to do the work or to do the few things this man can then do. That is, the physical effort.

"In addition to all this, the man was forced to use crutches. Walking with crutches is not normal walking. Walking with crutches is not a support to the cardiovascular system as one would expect. Quite the converse is true: That in the use of crutches, there is more work called on for the cardiovascular system. This is the whole cardiovascular to perform.

"So, for all these factors, it is my judgment that Mr. Lieberman suffered the fatal cerebral vascular disturbance at the time he did as a result of the accident which he sustained in April of 1956." There is no question that the testimony of Dr. Digilio, the hospital medical report and in part, the testimony of Dr. Laskin and Dr. Zachary Friedenberg, support a finding of causal relationship.

In cases where the medical testimony is conflicting the credibility of the medical witnesses and the issues of fact created by this testimony are for the compensation authorities. *Stites v. Rex Bar*, 202 Pa. Superior Ct. 587, 198 A. 2d 615 (1964). It is our duty to consider the evidence in the light most favorable to the party prevailing before the board and all reasonable inferences must be drawn in support of the board's decision. Also it is for the referee and the board to determine the weight of the testimony. *Birosak*

v. Shawnee Inn, 198 Pa. Superior Ct. 652, 184 A. 2d 120 (1962).

The decedent was a carpenter and never lost a day of work in twenty-three years until the accident. There is no evidence that he had any complaints prior to the accident that in any way curtailed his regular employment. He fell eighteen feet while climbing to inspect a ceiling condition. The hospital notes do show that he did have arterial changes, "moderate coronary disease". The hospital notes also show that at the time of his admission "heart is regular, no murmurs. No failure". After surgery on April 12, the hospital record notes, "general condition good. Heart rate and rhythm regular". This does not mean that there was not a "certain amount of arteriosclerosis" as testified by Dr. Digilio, when the admitted cause of death was a "cerebral vascular accident". This man was hopping around on crutches after a long period of inactivity, with a nerve palsy which resulted in excessive brain change, which, in the opinion of claimant's medical expert, caused the onset of death by affecting the blood vessels of the brain. Where injuries are suffered due to an accident, the fact that he had a chronic ailment which rendered him more susceptible to such injury than an ordinary person would be, does not defeat his right to compensation. *Fehr v. Y.M.C.A.*, 201 Pa. Superior Ct. 107, 192 A. 2d 143 (1963).

In *Parks v. Winkler*, 199 Pa. Superior Ct. 224, 184 A. 2d 124 (1962), the claimant developed a complication because he was "immobilized" by his accidental injury. The accident occurred on October 31, 1957 when he was struck by a truck and sustained a back injury. He died on April 19, 1959 as a result of a pulmonary infarction due to phlebothrombosis. This Court held that the medical testimony established a causal connection between the accident and the death. In *Stites v. Rex Bar*, supra, the claimant had a finger laceration which became infected. The accident occurred on February 24, 1953. On March 11, 1953 he was admitted to the hospital and was operated on March 31,

1953. He died April 8, 1953. The sole issue in that case was whether the board's finding in favor of the claimant was based on competent medical evidence that the accident suffered by the decedent was causally connected with his death which occurred on the thirty-eighth day after his fingers were lacerated. This issue was decided by this Court in favor of the claimant. In the instant case the surgery that was necessary as a result of the accident took place on April 12, 1956, while his death occurred on June 21, 1957. See also: Collection of cases in Vol. 21, Pittsburgh Law Review 445, 458, note 11.

Judgment affirmed.

December 4, 1964, Reargument refused by the Superior Court of Pennsylvania.

March 1, 1965, Allocatur refused by the Supreme Court of Pennsylvania.